

Zoning Board of Appeals Decisions Decisions for: 06-05-2014

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FALMOUTH ZONING BOARD OF APPEALS

FINDINGS AND DECISION

Special Permit No: 100-13

Applicants: INDUSTRIAL TOWER and WIRELESS, LLC of Marshfield, MA

Property Address: 284 Old Meeting House Road, East Falmouth, MA
Assessor's Map: Map 28, Section 05, Parcel 001, Lot 000

Date of Hearing(s): December 5, 2013, February 20, 2014, May 1, 2014 and June 5, 2014

Summary: Denied (Motion did not carry with a 2 - 2 vote)

Zoning: Agricultural A
Groundwater Overlay: Green Pond Coastal Pond Overlay

PROCEDURAL HISTORY

1. On October 21, 2013, Industrial Tower and Wireless, LLC (hereinafter referred to as Applicant) of 40 Lone Street, Marshfield, MA through their representative, John Champ, filed an application, plans and information with the Board of Appeals (hereinafter referred to as Board) for a Special Permit pursuant to Section 240-38 and 240-163 of the Code of Falmouth to construct a wireless communications 150' monopole on subject property known as 284 Old Meeting House Road, East Falmouth, MA – Map 28, Section 05, Parcel 001, Lot 000. The subject property is owned by Midway Trap and Skeet Club of Falmouth, Inc. A letter of authorization from Midway for Applicant has been submitted to the file. The subject property consists of 19.7 acres that is zoned Agricultural A and is located within the Green Pond Coastal Pond Overlay District and is partially located in the Search and Rescue Overlay.
2. A duly advertised public hearing was opened on December 5, 2013 and continued to February 20, 2014 as the Zoning Administrator sent this to Cape Cod Commission (hereinafter referred to as CCC) as a DRI. On February 20, 2014 the application was still before the CCC so the Board continued the hearing to May 1, 2014. At the May 1, 2014 hearing testimony was given and public comment heard. The Board required further information and continued the hearing to June 5, 2014 where further testimony and public comment was heard. Waivers were filed with the Town Clerk that continued the hearing process to July 28, 2014 (see file).
3. On June 5, 2014 the Board closed the hearing and took it under advisement until July 17, 2014 at a duly posted meeting of the Board where the Board reviewed and discussed for possible vote.
4. On July 17, 2014 at a duly posted open meeting of the Board of Appeals, voting members discussed and voted 2 – 2 to grant the application. The motion did not carry; application denied.
5. Board members sitting: Chairman David Haddad, Clerk Scott Zylinski, Member McNamara, Member Johnson and Associate Kimberly Bielan. Member Zylinski's term expired 6/30/2014 so the sitting Board will vote as a four member quorum.
6. The Board received documents and exhibits from interested parties during the public hearing which are on file in the office of the Board of Appeals at Town Hall.
7. The Board requested, and received, referrals from Town Departments that have been submitted to the file. Also contact was made via e-mail to Fire and Police departments relative to coverage issues and driveway and responses to the e-mails were submitted as well.

8. There were nineteen (19) letters submitted to the file in opposition of the proposed 150' monopole at 284 Old Meeting House Road, East Falmouth, MA.

9. There was one letter of concern submitted to the file for the proposed 150' monopole at 284 Old Meeting House Road, East Falmouth, MA.

All plans and information submitted by the Applicant are on file with the Board of Appeals office and have been reviewed by the Board. The Board members conducted individual site inspections.

Hearing - May 1, 2014:

Attorney Jeffrey Angley with Phillips & Angley of Boston was present on behalf of the Applicant as well as John Champ, Site Acquisition Specialist with Industrial Tower & Wireless and Kevin Delaney of Industrial Communications and Electronics. Kevin Delaney presented a power point presentation that showed an aerial of the site plan via Google and noted it will have a 12' wide driveway, approximately 125' long, leading to the tower from Old Meeting House Road. The driveway will have a security gate off the road to keep unauthorized vehicles from accessing site. The site to be used by Industrial Tower & Wireless is a 100' x 100' area on subject property owned and operated by Midway Trap and Skeet Club of Falmouth, Inc. The site to be used by Applicant will have an 8' chain link fence surrounding said area. Shelters to be used by carriers (AT&T, Metro, PCS and Verizon) will vary by size needed - AT&T will be at the 140' mark on the tower; Metro PCS will be at the 130' mark; and Verizon will be at the 120' mark - which will leave room for up to two additional carriers on said pole. Mr. Delaney explained that a balloon site test was completed.

Attorney Angley explained that the applicant entered into a long-term agreement to lease the 100' x 100' site as shown that is approximately 600 feet off Old Meeting House Road and the tower being proposed at 177' off of the road, with a driveway to access site that will have gravel and drainage runoff to the grass alongside driveway. He explained the tower will be blue or steel gray to blend into the sky and acoustic screens are on site to protect the property. He discussed the project noting there is a significant gap in coverage for one to two miles in a high traffic area. He believed no other areas can support this coverage and that the tower is minimum adequate height for coverage. Attorney Angley said he believes the project complies with all zoning bylaws; the site will remain wooded and will be monitored with just electricity demands.

Board members asked questions regarding other sites reviewed relative to coverage gap, balloon test conducted, security of site, lighting on site, bird protection policy, decommissioning policy and Applicant's representatives responded (see Minutes).

Attorney Angley answered that out of the 1200 sites reviewed this site supports a fall zone for the 150' tower as well as having a full coverage gap, it avoids the wetlands and is buffered.

Kevin Delaney explained that there will be up to five carriers on the monopole and Industrial Tower & Wireless does the installation and work for the carriers; an activity log is kept on site. Mr. Delaney stated that there was a balloon test conducted at the site but no pictures were taken. He further explained that the site area would be slightly increased to accommodate the fall zone of the tower [tower is 150' with the site being 100' x 100'] and that nothing would be constructed in the fall zone.

A member asked if a tower could be adjusted to prevent a new cell tower and Mr. Delaney stated yes and he explained that carriers are put on the tower at different levels depending on their frequency levels. Mr. Delaney addressed the security of the site explaining the 8' fence, locked gate, activity log and monitoring of the site; lighting will be as conditioned by the CCC. There is a turnaround at facility off driveway; emergency vehicles would have to back out onto Old Meeting House.

Mr. Delaney explained that Osprey do nest on the towers and that they do not have a policy in place for bird protection but if a bird nests on the tower, Industrial Tower will construct a pole for nesting and relocate the nest once the babies take flight.

Public Comment in Opposition:

Peter Hargraves of 31 Southview Way stated opposition of the plan and read from his May 1, 2014

statement that was submitted to the file. He cited property devaluation, possible health impacts from radio frequencies and visibility of tower. Mr. Hargraves answered questions from the Board.

Joe Andrews of 302 Acapesket Road stated opposition and noted his family owns abutting property(s) – Andrew's Farm – and other land that is being subdivided for single-family dwellings that abut the proposed site for the monopole. He commented that this is an agricultural area with residential abutting. He feels the tower will adversely impact their ability to sell lots beyond that of the existing gun club that the tower will be located on. Mr. Andrews questioned why the Applicant did not contact him as a site location.

Sally Dawicki of 329 Old Meeting House Road stated opposition citing that she feels the coverage isn't an issue for them – no one in the area seems to be at a loss for cell service and that people in the area were not contacted regarding cell service. She feels this is a huge impact – visibly from her property, trees being removed, possible radiation and 24/7 noise.

Attorney Angley stated that, as a reminder, the radio frequency coverage is regulated by FCC and radio frequency is not an issue here. He explained the report they submitted contained a study where sensors were put at the site for six days to measure ambient noises and they will be happy to continue to do that for additional information. He further stated that telecommunication coverage data from the engineers has been submitted to the file.

The Board asked Attorney Angley and Kevin Delaney if they would be willing to do another balloon test from the site. They agreed and will work with the Zoning Administrator to post date and time of said test for all interested parties.

Member Bielan made a motion to continue the hearing to June 5, 2014 at 6:00 PM. Member Johnson seconded the motion. Motion carried 5 – 0.

Note: A balloon test was conducted by the applicant from 2:00 pm to 6:00 PM on May 19, 2014. The Zoning Administrator contacted Mr. Hargraves via e-mail (see file) who stated he would contact the parties within the Southview Way development; and she posted a notice on the Board of Appeals' website.

Hearing - June 5, 2014 at 6:00 PM

Voting members present: Chairman Haddad, Clerk Zylinski, Member McNamara, Member Johnson and Associate Bielan

Attorney Jeffrey Angley was present on behalf of Industrial Tower along with representatives Kevin Delaney and John Champ.

Chairman Haddad reviewed additional requested information by the Board at previous hearing.

Attorney Angley spoke on information the Board had requested: proposed simulation, site analysis, gap coverage and he summarized application and how it fit into the community and Town bylaw.

Kevin Delaney reviewed the balloon test done on May 19, 2014 from 2:00 pm to 6:00 pm. He stated the balloon was not visible from 36 Southview Way at 2,367' (north end); not visible from the Old Meeting House cranberry bog at 3,417 feet; not visible 676 feet from site at Viber Lane [Andrews Farm property]; it is visible at 330 Old Barnstable Road – 3,013 feet; and 680 feet to gate is visible.

Member Zylinski asked if any consideration was made for subdivision proposed on Andrews Farm in that there will be more residences.

Attorney Angley stated that the site is not developed yet; but the proposed is off the street and surrounded by trees and not visible from a lot of sites. He said sites to consider are limited and the criteria of sites is reviewed. The Cape Cod Commission (CCC) does not approve of uses of agricultural land outside of what is allowed without a permit. He said we have drop call analysis and CCC's determination; Industrial Tower is limited.

Attorney Angley said they gave the Board coordinates for 1340 parcels and this site is the only site that fits.

Member Cool asked if sound study was done and included generator running.

Attorney Angley stated when the generator is running it meets all standards of Town and CCC dba criteria.

Member Bielan asked about the last 2 parcels on Industrial Tower's final list of 17 lots and why the two are not feasible.

Attorney Angley said they are resource areas which are not allowed constructing. John Champ said they are bog areas that are considered wetland.

Member McNamara commented on a discussion at previous hearing regarding protection of birds and asked if Industrial Tower and Wireless have a 'bird policy' [cited recent issue with bird kill at a separate tower].

Mr. Delaney said he was aware of the issue and contacted Mass. Special Wildlife specialist, Tom French who informed him that no action should take place at a tower/pole from May 1 to September 1 and said that is what they will do.

Member McNamara asked what work will be done by Industrial Tower.

Mr. Delaney stated the only work carriers do is ground work – Industrial does all tower work and installation.

Member McNamara asked if the 'significant gap' is computer based.

Attorney Angley stated it takes into consideration drop calls, computer and model tests.

Member McNamara asked what is criteria is for 'gap'.

Attorney Angley stated it is a measurement in size of area and number of users in area.

Member McNamara asked what the 17 sites [final list by Industrial Tower] were based on.

Attorney Angley said analysis of sites was submitted to the file and are based on site size; vacant land; meet fall zoned; wet sites; and changes in elevation that is not appropriate for tower communication. He explained they look for sites not near homes with property elevation.

Member McNamara asked why owner of Andrews Farm was not on the list.

Attorney Angley said it is not appropriate as it has a commercial nature and is zoned agricultural.

Member McNamara asked when the 'gap' was identified.

John Champ stated two years ago.

Member McNamara asked if other cell towers could be increased to accept lack in service [significant gap].

Mr. Delaney stated no; and that utility poles are under tree cover – not appropriate.

Chairman Haddad asked what the decommissioning of the tower would be.

Mr. Delaney said a Town will usually require a bond. If the tower is abandoned the Town will have a bond for \$12,120.00.

Member Cool asked how 'significant gap' is determined.

Mr. Delaney said it is recorded data – failed calls.

Attorney Angley said "significant" was determined in court as the number of areas affected – data from Mass Housing shows approximately 3,000 users in this area affected.

Member Cool comment that Industrial Tower says it is significant based on that.

Attorney Angley said correct.

Public Comment:

Peter Hargraves of 31 Southview Way said he is 1,400 feet from the proposed tower. Gave a power point presentation of issues in opposition to the tower. He said no one in the development would see the proposed tower but that it would be visible from the nearby golf course on Carriage Shop Road, proposed lots in Andrews's subdivision, picnic area at the farm and from 14 John Parker Road. He said the tower is a contamination and a pollutant and will devalue properties; he asked the Board to consider all the people in this area.

Member Bielan asked Mr. Hargraves if his chief complaint is visual.

Mr. Hargraves said yes and health considerations, which according to Federal Communications is not allowed regardless of documented cases of cancer from these; there is emotional and physical affect.

Member Cool asked Mr. Hargraves if he spoke with any realtors regarding devaluation of property.

Mr. Hargraves stated no – it is anecdotal information from realtors but in other parts of the world 2 to 20% is discounted. He said people want natural scenery.

Member McNamara asked Mr. Hargraves if there is a gap, would any site be acceptable or unacceptable due to visual aspect.

Mr. Hargraves said this tower is proximity to residential and natural area – visually present unacceptable.

Lacey Brunelle of 303 Old Meeting House Road stated opposition own their property and was unaware this tower was being proposed. She stated she has two cell phones (no home phone) and has never had dropped calls or problems – one phone is Verizon. She said she is a cancer survivor and would not have purchased the home if they had known a cell tower was going to be erected.

Shelley Dawicki of 329 Old Meeting House Road submitted a letter of opposition and said they never considered cell tower in their front yard and asked Board to put off until a bylaw has been developed for cell towers specifically.

Joe Andrews of Andrews Farm on Old Meeting House Road stated opposition saying he could have been one of the sites based on his acreage and location, but has never been contacted by Industrial Tower. He said 6 months out of the year he will see the tower; and the lots in the subdivision that have not been built to date will have a constant visual of the tower.

Attorney Angley stated that Mr. Andrews was not contacted as his land is open without trees and no buffering – not viable site. He asked the Board to approve the application as it is acceptable under FAA Regulations, there is a lack of coverage in the area, this is the only viable site and it meets the Town bylaw intent.

Board Discussion:

Member McNamara comment that the lack of a bylaw that is specific to cell tower locations – not a reason to deny. He said other gaps in other areas; he is personally troubled by 1 court case and only one viable site – burden is on carrier and we don't have a ranked order, an order that could work. He said the flip side is the opposition appears to be 'visual' issue. He said the applicant says this is the only site. He is split on 'significant gap' issue, dropped call data and if the Board approves this there should be a condition on 'bird policy'. He said he is leaning to being opposed as he cannot believe this is the only viable site.

Member Foreman said can't prohibit if there is a definite need, if there are other towers in the area can

they be adapted? Is there an issue on adequacy? He discussed case law and Section 240-216 of bylaws.

Member Zylinski agrees with Member McNamara. He has concern with abutter and her health conditions. He said the Board has to be mindful. He said he is not happy with the bird issue not being addressed and does not believe the applicant has proved the burden.

Chairman Haddad commented on property value; said 34 abutting homes did not see balloon; spoke on the 17 final sites out of the 1340 sites; and he commented that the data shows need.

Member Bielan said she is leaning in favor of applicant, seems they are entitled and meet the requirements for a special permit under the bylaw and other regulations. She said there is one issue and that is 'visual impact' – you can see a cell tower. She said there is a large gap found in 3 tests.

Board discussed at length.

Attorney Angley stated he feels all has been looked at; CCC analyzed all sites – comprehensive analysis – this is only viable site – can't hide a cell tower.

Member Johnson made a motion to close the hearing. Member McNamara seconded the motion. Motion carried 5 – 0.

Board discussed and comments were made by members that they needed to further review the information that was recently submitted.

Member McNamara made a motion to take the application under advisement. Member Bielan seconded the motion. Motion carried 5 – 0.

Open Meeting: July 17, 2014.

Chairman Haddad reviewed the previous hearings and that the hearing process was closed on June 5, 2014 and the application taken under advisement.

Board discussion:

Member Johnson said she reviewed found the combination of all information and legal cases submitted, including the CCC decision that involved their mission to protect agricultural land, views and vistas. She said she feels this is the only site that fits the gap coverage; in the four legal cases gap coverage was an issue and she feels comfortable that this Board does not have significant evidence to deny.

Member Bielan stated that this is a special permit and she feels the application meets criteria. She said under the bylaw this is a special permit and allowed in an agricultural zone – she is in favor of the application.

Member McNamara said the bylaw doesn't give guidance for cell towers; the Town may possibly need an overlay district for this use. He said he has concern in three areas: 1) existence of significant gap of service – not clear in evidence – listed criteria is based on testimony and information by applicant; the tower will have five (5) carriers so, if there is a gap why was there no urgency; and if a two-mile gap is significant, then there could be towers every two miles. 2) Alternate sites – 1,300 sites; court states it is the burden of the applicant, what is feasible? The Andrew's farm was never contacted and a substantial area of that property has tree coverage and is not used agriculturally (CCC decision). 3) Burden of proof – he doesn't feel the applicant sufficiently gave proof that this is the only site; he found three sites on the list and reviewed them – 681 Sandwich Road, 74 Turner Road and 44 Turner Road. Two are in the SAR (Search and Rescue) overlay and may therefore not be appropriate, but the third has only "impeded" setbacks in contrast to those sites where the necessary setbacks could not be satisfied. He then reviewed court cases regarding comparison by applicant for sites. He felt that the applicant compared sites for what would be more efficient for the applicant rather than what would be less impactful for the community. He said based on his review he feels burden has not been met and he is not in favor of the application.

Chairman Haddad commented on 'feasibility'. He said he finds it hard to believe there aren't any other sites and he feels there has been no proof submitted of dropped coverage, there are no complaints

regarding service and that the data market is driven by the applicant/carriers. He said he would not be in support of the application.

Board discussed comments. Member McNamara stated that the applicant has to look at what is favorable to the Town – not just what they want. Member Johnson said that FCC includes competitive market and CCC review requires more data before they decide that they approve – which they did.

DECISION

Member Johnson made a motion to grant the special permit to Industrial Tower and Wireless. Member Bielan seconded the motion. Vote was 2 to 2 with Members Bielan and Johnson in support and Members McNamara and Chairman Haddad opposed. Motion did not carry – application is denied.

Special Permit Decision by Falmouth Zoning Board of Appeals continued:

Special Permit#: 100-13

Applicant: Industrial Tower and Wireless LLC of Marshfield, MA

Subject Address: 284 Old Meeting House Road, East Falmouth, MA
Map 28, Section 05, Parcel 001, Lot 000

Action: The Board of Appeals, by the Chairman's signature below, represents that the Board voted as follows for the above referenced Special Permit.

Vote: Board vote was 2 - 2 to Grant the Special Permit to Industrial Tower and Wireless LLC. Motion did not carry. Application denied.

David Haddad, Chairman Date filed with Town Clerk

Notice is hereby given that any appeal from this Decision shall be made pursuant to Section 17 of M.G.L. Chapter 40A and shall be filed within twenty (20) days after this decision by the Board of Appeals has been filed with the Falmouth Town Clerk.

Notes:

100-13 Industrial Tower & Wireless LLC / 284 Old Meeting House Rd / Denied (Motion did not carry)
posted to web 7/29/14 mm